ATTORNEYS
Heather R. Kendall-Miller
Natalie A. Landreth
Erin C. Dougherty
Matthew Newman

Native American Rights Fund

801 B Street, Suite 401, Anchorage, AK 99501 (907) 276-0680 FAX (907) 276-2466

EXECUTIVE DIRECTOR
John E. Echohawk

MAIN OFFICE
1506 Broadway
Boulder, CO 80302-6926
(303) 447-8760
FAX (303) 443-7776

WASHINGTON OFFICE
1712 N Street N.W.
Washington, D.C. 20036-2976
(202) 785-4166
FAX (202) 822-0068

WEBSITE ADDRESS
www.narf.org

August 19, 2013

Testimony Before the Secretarial Commission on Indian Trust Administration and Reform by Heather Kendall-Miller

Report on *Akiachak Native Community v. Salazar*, No. 06-969 (RC) (D.C. March 31, 2013).

Esteemed Commission Members:

Welcome to Alaska, the home to 229 federally recognized Tribes. Thank you for your time today and the opportunity to speak with you about trust lands in Alaska. I have been asked to present my perspectives about the recent U.S. District Court decision regarding *Akiachak Native Community v. Salazar* and its implications for taking land into trust in Alaska.

Background:

Let me begin by drawing from the leading Indian law treatise, the Cohen Handbook of Federal Indian Law, a statement that says that "understanding history is crucial to understanding doctrinal developments in the field of Indian law." So, here too, in Alaska.

The Alaska experience shows that Federal officials, often draw from their experience of Indians on reservations in the Lower 48 states, and mistakenly assume that the same legal principles applicable there do not apply in Alaska. This is due in large part to the perception that Alaska's history is somehow "different," and that the 1971 Alaska Native Claims Settlement Act ("ANCSA") altered the legal principles that apply to federally recognized Tribes in Alaska.

But in fact and law, federally recognized Tribes in Alaska have the same legal status as other federally recognized Tribes singled out as political entities in the Commerce clause of the United States Constitution.

Prior to enactment of ANCSA, Congress adopted statutes that imposed trust responsibilities on the Secretary over lands in Alaska for Alaska Natives, including statutory obligations over Alaska Native allotments, fiduciary responsibilities over restricted Native town sites, general trust authority over India Reorganization Act (IRA) tribal reserves, and specific responsibilities related to leases on executive order reserves.

In 1934, as part of the Indian Reorganization Act of 1934, Congress in section 5 authorized the Secretary of the Interior to take real property into trust on behalf of Tribes and individual Indians; and in section 7 empowered the Secretary to declare newly acquired lands Indian reservations or to add them to existing reservations.

In 1936, the IRA was amended to facilitate application to the Territory of Alaska. Section 1 of the 1936 amendments extended sections 1, 5, 7, 8, 15, and 19 of the IRA to Alaska. Section 2 of the 1936 amendments gave the Secretary authority to designate certain lands in Alaska as reservations but placed special conditions on Secretarial creation of any new reservations in Alaska. A total of six reservations were created in Alaska pursuant to the Act. Among those was the 1.8 million acre reserve set aside for the Neet'sai Gwichin of Arctic Village and Venetie.

In 1971, Congress enacted the Alaska Native Claims Settlement Act revoking all existing reservations in Alaska (except for the Metlakatla Reserve). Importantly, however, ANCSA did not repeal any portion of the IRA, nor any portion of the 1936 amendments.

In 1976, Congress enacted the Federal Land Policy Management Act (FLPMA). Section 704(a) of FLPMA repealed section 2 of the 1936 amendments which had placed conditions on the Secretary's creation of new reservations in Alaska. Section 704(a) of FLPMA did not repeal any other part of the IRA or the 1936 Amendment, nor otherwise amend or repeal the amended IRA's application to Alaska.

In 1978, in response to a request by Arctic Village and Venetie to have their former reservation lands placed back into trust pursuant to section 5 of the IRA, then Associate Solicitor for Indian Affairs, Thomas Fredericks, issued an Opinion which stated the conclusion that ANCSA precluded the Secretary from taking land into trust for Native in Alaska.

In 1980, the Department of the Interior ("DOI") for the first time promulgated a regulatory process to make fee-to-trust transactions more uniform. Those regulations expressly excluded acquisition of trust land by the Secretary for Tribes or tribal members situated in Alaska other than Metlakatla. The Department's preclusion of Alaska Tribes (other than Metlakatla) was based upon the 1978 Fredericks Opinion.

In1994, the Chickaloon Indian Association, along with other Tribes, filed a petition for rulemaking with the Secretary of the Interior requesting that the Secretary revise 25 C.F.R. § 151 Part 1 (the Alaska prohibition) to include Lands in Alaska. The petitioning Tribes further urged the Secretary to revoked the Fredericks Opinion as erroneous and contrary to existing law.

In January of 1995, the agency published notice of the Tribes' petition and requested comment on the petition for rulemaking concerning Alaska Native land acquisitions. Four years later in April 1999, the Secretary proposed a revision to Part 151. The notice of proposed rule making specifically addressed discretionary land acquisitions in Alaska as follows:

> Both the current and proposed regulations bar the acquisition of trust title in land in Alaska, unless the application for such acquisition is presented by the Metlakatla Indian Community or one of its members. The regulatory bar to acquisition of title in trust in Alaska in the original version of these regulations was predicated on an opinion of the Associate Solicitor, Indian Affairs, which concluded that the Alaska Native Land Claims Settlement Act precluded the Secretary from taking land into trust for Natives in Alaska.
>
> Although that opinion has not been withdrawn or overruled, we recognize that there is a credible legal argument that ANCSA did not supersede the Secretary's authority to take land into trust in Alaska under the IRA.

The Notice of Proposed Rule-making specifically invited comment on the continuing vitality of the prohibition, the Frederick's opinion, and issues raised by the Tribe's petition.

On January 2001, the Secretary published a final rule amending Part 151 Trust Lands Regulations and specifically addressing the comments submitted by the petitioning tribes, the agency stated:

> The Solicitor has considered the comments and legal arguments submitted by Alaska Native governments and groups on whether the 1978 Solicitor's Opinion accurately states the law. The Solicitor has concluded that there is substantial doubt about the validity of the conclusion reached in the 1978 Opinion . . . Accordingly, the Solicitor has signed a brief memorandum rescinding the 1978 Opinion.

Notwithstanding the rescission of the Fredericks Opinion, the final rule continued in place the Alaska prohibition against acquisition of trust lands in Alaska. However, the final rule explained the decision to continue the prohibition as a temporary measure stating that:

> The position of the Department has long been, as a matter of law and policy, that Alaska Native lands ought not to be taken in trust. Therefore, the Department has determined that the prohibition in the existing regulations on taking Alaska lands into trust (other than Metlakatla) ought to remain in pace for a period of three years during which time the Department will consider the legal and policy issues involved in determining whether the Department ought to remove the prohibition on taking Alaska lands into trust.

On January 20, 2001, George Bush was sworn in as President. On the same day President Bush's administration ordered a delay in the effective date of these and other pending regulations in order for review by the President's own new appointments. On November 9, 2001, the Secretary of the Interior formally withdrew the final rule, leaving in place the regulatory prohibition against taking lands into trust status in Alaska (except for Metlakatla) notwithstanding the rescission of the

Fredericks Opinion which formed the basis for that prohibition bar. The regulatory prohibition prohibits Alaska Tribes from petitioning the Secretary to take lands into trust, and prohibits the Secretary from acting favorable on any such petition.

Litigation:

Litigation was commenced in 2006, when four Tribes and one Native individual—the Akiachak Native Community, Chalkyitsik Village, Chilkoot Indian Association, Tuluksak Native Community (IRA), and Alice Kavairlook—brought suit to challenge the Secretary of the Interior's decision to leave in place Part 1 of 25 C.F.R. § 151 (the Alaska prohibition) that as it pertains to federally recognized Tribes in Alaska.

Plaintiffs argued that this exclusion of Alaska Natives—and only Alaska Natives—from the land into trust application process is void under the IRA section 476(g), which provides:

> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

25 U.S.C. § 476(g). The State of Alaska intervened to argue that the differential treatment is required by the Alaska Native Claims Settlement Act (ANCSA). The Secretary defended the regulation by reference to ANCSA and argued that while ANCSA did not revoke Secretarial authority to take lands into trust, it supported the policy and practice of the Secretary's discretion to exclude Alaska tribes from the land into trust regulatory process.

Decision:

The court disagreed. On March 31st, 2013 Judge Rudolph Contreras issued a decision granting summary judgment to plaintiff Tribes. The Court rejected the State's argument that ANCSA's extinguishment of aboriginal claims and Congress's declaration of purpose implicitly extinguished the Secretary's authority to take lands into trust in Alaska, and held that the Secretary's Alaska land-into-trust authority was conferred in 1936 with the IRA's application to Alaska, which has not been explicitly revoked by ANCSA or any other legislative action.

Having established that ANCSA did not revoke the Secretary's authority to take Alaska lands in trust, the Court next examined the legality of 25 C.F.R. § 151.1 (the Alaska bar) and found it to be inconsistent with the Congressional mandate that the Secretary not diminish the privileges available to tribes relative to the "privileges . . . available to all other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 476(g).

The Court then ordered briefing as to the scope of the remedy in this case and whether it is only the Alaska exception that is deprived of "force or effect," or whether some larger portion of the land-into-trust regulation must fall.

The State filed a motion for reconsideration in May 2013, as well as a motion to alter the judgment so it could take an interlocutory appeal, rather than having to wait for the completion of rule-making following a remand to the Secretary The Plaintiffs and the Secretary opposed the State's Motion for reconsideration.

On the issue of remedies, Plaintiffs urged the Court to sever the Alaska exception from 25 C.F.R. 151 and remand to the agency so that it could engage in curative rule-making to develop a process and criteria for Alaska lands. The federal government, however, joined the State of Alaska in requesting that the court NOT remand to the agency for curative rule-making but simply enter final judgment so the case can be immediately appealed to the D.C. Court of Appeals.

In addition, the Secretary filed her own motion and argued that the case should be reconsidered to hold that it violated the Administrative Procedures Act only and not the IRA. In particular, the Secretary in her briefing argues that the Court's holding on IRA subsections 476 (f) and (g) is "sweeping in its broad, unlimited statements regarding the 1994 Amendment to the IRA and could potentially have unintended consequences across the federal government. Accordingly, she asks the Court to avoid relying on those subsections of the IRA and to limit its decision to the holding that Interior's prior rationale relying on ANCSA in support of the Alaska exception was legally flawed.

Briefing has been completed and we are awaiting a decision from the court.

That is the summary of the litigation and the Department of Interior's pattern and practice over the last thirty years when it comes to trust lands in Alaska. For a federal agency that has a moral obligation to uphold and abide by the highest fiduciary standards when it comes to its trust responsibility, the agency's track record in Alaska can fairly be described as abysmally entrenched in a bureaucratic attitude and preference to do nothing.

This atrocious record leads me to the questions that were posed to each of us here today.

Questions:

1. **The first, do we have any recommendations to improve or streamline delivery of services to trust beneficiaries?**

Yes. Stop treating Tribes in Alaska differently. As stated earlier, under the law federally recognized Tribes in Alaska have the same legal standing as Tribes elsewhere and are therefore entitled to the same immunities and privileges enjoyed by all federally recognized Tribes.

2. **What are the top three recommendations that you think would improve or strengthen trust management and/or administration for the Commission to consider?**

In response I would suggest the following. The briefing in the Akiachak case shows that the Department of the Interior is more concerned about avoiding the task of taking on difficult issues and instead falls back on its institutional bureaucratic lethargy. This avoidance, or let the courts figure it out, attitude is antithetical to the trust relationship. Thus, the Commission should recommend that the Department of the Interior engage in a curative rule-making that develops a process through notice and comment for taking lands into trust in Alaska.

Second, this Commission should make clear that the federal government's trust responsibility extends to Tribes *even when trust assets are not at issue.* The trust responsibility should extend to government to government consultation on issues like climate change impacts. The number of tribal communities in Alaska that are facing relocation due to erosion and climate change are staggering. They need the help of the federal government in facing this challenge.

Third, this Commission should recommend that the BIA and IHS stop fighting Indian Tribes and Health Consortiums on issues of contract support costs, money that is vitally necessary to the delivery of Indian health care in Alaska but denied by the federal agencies that administer those funds.

3. **Do you have any suggestion of other trust administration models the ITC should examine as it looks towards improving the DOI trust administration and management?**

I would suggest that you confer and consult with the Honoring Nations Program of the Harvard Project on American Indian Economic Development. That program has a wealth of information and expertise that can be tapped for purposes of trust administration models for Indian country.

4. **Do you have any recommendations specific to Alaska regarding the federal trust relationship with Alaska Native tribes, trust lands, or subsistence hunting and fishing rights?**

Obviously, tribes in Alaska like our sister tribes in the Lower 48 States need land in trust for a wide range of beneficial purposes. By acquiring land in trust, tribes are able to provide essential governmental services to their members, including health care, education, housing, jobs and other economic development opportunities, as well as court and law enforcement services. Trust land is also necessary for tribes to promote and protect historic, cultural, and religious ties to the land. Trust status further enhances the protections of the tribal land base by making the lands free from taxation and foreclosure. It is thus an important and necessary tool to promote tribal self-determination. As stated earlier, it is important for the federal agencies to stop treating Tribes in Alaska differently and undertake curative rule-making.

With respect to subsistence hunting and fishing rights, the Commission should support the range of administrative and regulatory changes that have been put forth by AFN and other Native groups in recent years.

And last and finally, I emphasize again that this Commission should make clear that the federal government's trust responsibility extends to Tribes *even when trust assets are not at issue.*

I thank you for your time today.